

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DUSTIN M. HETRICK,

Appellant.

No. 33618-9-II

UNPUBLISHED OPINION

Armstrong, J. – Dustin M. Hetrick appeals his adjudication of first degree child rape. He claims that the State failed to prove beyond a reasonable doubt that sexual intercourse took place and that the juvenile court did not apply close scrutiny to the complaining witness’s testimony. Finding no error, we affirm.

Facts

During Sunday church services at the Salvation Army in Bremerton on October 17, 2004, eleven-year-old J.A. left to use the restroom. Fifteen-year-old Hetrick was standing in the hallway outside the restroom and blocked her passage. He then grabbed her sides, pulled her to the ground, and removed her pants and underpants. He asked, “Do you have a boyfriend?”

Report of Proceedings (RP) at 53. J.A. replied, “No, I don’t want one.” RP at 53. Hetrick removed his pants, laid on top of J.A., and asked, “Am I deep enough?” RP at 53.

She described his penis as the same color as his skin and explained when he asked that question, his penis “was in my area, around my area.” RP at 54. She described her *area* as her *private* and that *private* was her word for her vagina. When asked if it was inside or outside her vagina, she replied, “Inside.” RP at 54. She said he pulled his penis out after five minutes and she ran to the bathroom, pulled up her pants, and then ran back to the church services.

Just before the final prayers, she again left the services to go to the bathroom. Hetrick was still standing in the hallway. Again he grabbed her, pulled her to the ground, and laid on top of her, this time while clothed. A short time later, Melody Bowen, a church member, saw them, asked what they were doing; Hetrick said they were wrestling. J.A. then left.

Bowen later testified that she had seen the two wrestling, they had their clothes on, J.A. was on her back, and Hetrick was on top of her. She said they looked surprised when she appeared. She described J.A.’s demeanor: “Well, at first J.A. was happy. They seemed to be playful, and she was smiling; and then she had an I-don’t-know look on her face.” RP at 39.

J.A. did not disclose what happened right away, explaining, “I was kind of scared to tell my parents, and I was waiting until the right time.” RP at 57. Marcia Baker, one of the church’s pastors, testified that when she heard about the incident from another church member, she asked J.A. and another girl if they knew anything about it. J.A. told her, “He tried, he tried to rape me.” RP at 86. After talking with J.A.’s mother, Baker contacted Child Protective Services. Baker said that J.A. did not tell her that she took two trips to the bathroom but Baker qualified

that by explaining that she did not question J.A. because the police had previously instructed her not to do so.

Bremerton Police Detective Kenny Davis interviewed Bowen, Baker, and Hetrick, and spoke on the telephone with J.A.'s mother. Hetrick admitted to Davis that he and J.A. had been wrestling in the hallway during the church services. He claimed that J.A. had told Baker, "Dustin *tried* to rape me." RP at 26. When asked at trial if she told Baker that Hetrick tried to rape her, J.A. replied, "No. I told her that he did." RP at 62. When asked if she used the word *tried*, J.A. said, "No, never did." RP at 62.

Mitch Anderson, a private investigator who was present during the defense and prosecution interviews of J.A., testified that J.A. never mentioned leaving the services twice to go to the bathroom. He testified that J.A. said the woman saw Hetrick on top of J.A. in the hallway and they both had their pants down.

The juvenile court found Hetrick guilty, reasoning:

I believe [J.A.]'s testimony that she and Dustin had sex that day.

...

The State is not required to prove who was present, and certainly, the fact that Ms. Baker wasn't there is evidence from the fact that there wasn't anybody in the teen room. And [J.A.]'s memory, in my mind, is suspect on many aspects of these things, both because of her age, because of the distance in time from October until today, and from what is obvious to me some sort of developmental disability. I don't know the specifics of her disability, but it was clear from today's testimony that she has challenges. Her demeanor in court today was odd, I think, at least from my perspective, in that whenever she was answering a question that was most pertinent, most pointed, most germane, she yawned, she stretched, she appeared to not even particularly be engaged. And I don't know if that's part and parcel of her challenges or not, but it was clear to me that I could not, just sitting here, be a valid interpreter of what her demeanor was just from watching her.

The time frames were somewhat of a concern to me. I believe Major Baker that she didn't get the report on this until November 6th, three weeks after

the event. But somebody knew, someone somewhere confronted Major Baker; and I don't know who it was, but obviously somebody who knew something went on other than the two teenagers wrestling in the hallway that Ms. Bowen saw triggered the confrontation between the church-goer and Major Baker, and whether that was [J.A.] telling somebody prior to the three weeks or not, I'll never know. But it gives me no concern about [J.A.]'s credibility on the fundamental point that she didn't talk to anybody until she was asked. And when she was asked, she gave essentially the same story here, and I use the term "essentially" in its most limited meaning.

The defense wants life to be black and white, and life isn't black and white; and this case is a fine example of that. I don't know if [J.A.] believed she was raped. I don't know if Dustin believed he was raping [J.A.]. All I come away with is the abiding belief that the State has proved beyond a reasonable doubt that the two of them had sex that day, and that's sufficient.

RP at 127-129.

Analysis

Hetrick claims that the State failed to prove beyond a reasonable doubt that he raped J.A. He claims that J.A.'s ever-changing story and her implausible explanations could not lead to such certainty.

On review of the sufficiency of the evidence in a juvenile or adult proceeding, we ask whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could have found the elements of the crimes beyond a reasonable doubt. *State v. E.J.Y.*, 113 Wn. App. 940, 952, 55 P.3d 673 (2002) (citing *State v. Avila*, 102 Wn. App. 882, 896, 10 P.3d 486 (2000)). We defer to the trier of fact on issues of credibility, conflicting evidence, and the persuasiveness of the evidence. *E.J.Y.*, 113 Wn. App. at 952 (citing *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992)). We treat unchallenged findings of fact as verities. *State v. Gentry*, 125 Wn.2d 570, 605, 888 P.2d 1105 (1995), *amended* 1999 Wash. LEXIS 448 (1999) (citations omitted). And we review any disputed findings to determine whether substantial

evidence supports them. *State v. Ware*, 111 Wn. App. 738, 742, 46 P.3d 280 (2002).

The State charged and adjudicated Hetrick of first degree child rape, a violation of RCW 9A.44.073(1), which provides: A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than 12 years old and not married to the perpetrator and the perpetrator is at least 24 months older than the victim.

Hetrick does not challenge the age requirements. He simply points to the inconsistencies in the trial testimony and argues that the juvenile court's credibility determinations could not have left it without a reasonable doubt as to the charges. He notes that J.A.'s testimony was inconsistent with most of the other witnesses. For example, Dustin admitted to the police that he and J.A. had been wrestling in the hall. And Bowen testified that J.A. had a playful, smiling demeanor. Anderson testified that J.A. said that the woman saw them with their pants down. Yet at trial, J.A. testified that she had made two trips to the bathroom, that the rape occurred during the first trip and that the woman saw them during the second trip when they had their clothes on.

Hetrick also points to J.A.'s delayed reporting, lack of physical, emotional, or mental symptoms, lack of physical corroborative evidence, and statements to Baker that Hetrick *tried* to rape her undermine her credibility. He complains that the State never asked J.A. whether *inside the area* meant that Hetrick penetrated her vagina.

Hetrick argues that substantial evidence shows that J.A. took one trip to the bathroom, that they were clothed while wrestling in the hallway, and that there was no sexual intercourse. Only this version, he insists, is consistent with the testimony from Davis, Bowen, Baker, and J.A.'s pre-trial statements.

The court found:

IX. That it is clear from the victim's age, obvious developmental disabilities, demeanor, and the time elapsed since the rape, that the victim's memory raised some questions. Her demeanor appeared to show that she was not engaged with the attorneys and staff in court. She also had difficulty with abstract concepts such as time and distance.

X. This court nevertheless resolves those questions raised by the victim's testimony by finding that this victim is a credible witness despite the challenges posed by her age, developmental disabilities, and maturity.

Clerk's Papers (CP) at 152-53.

Our review of the record leads us to affirm Hetrick's adjudication. While there were discrepancies between J.A.'s testimony, her pre-trial statements, and some of the other witnesses' recollections, she was subject to extensive cross-examination.¹ This process did not controvert her statements regarding the rape itself. She testified that he pulled their pants down, that he put his penis inside her, that his penis was the same color as his skin, and that he asked her, "Am I deep enough?" RP at 53-54. We weigh in this assessment, as the trial court did, that J.A. was eleven years old, developmentally delayed, and apparently at a loss to adequately explain time and distance. In our view, the juvenile court meaningfully scrutinized J.A.'s testimony before concluding that she was credible. *See State v. Peterson*, 2 Wn. App. 464, 469

¹ Hetrick argues that J.A. changed her story about the two trips to the bathroom. But the record does not support this claim. Baker testified that she only asked J.A. enough questions to be certain she needed to report the incident. She never testified that J.A. said she only took one trip to the bathroom. Similarly, Anderson testified that J.A. never said there were two trips to the bathroom. But he did not testify that she said she only made one trip.

Hetrick also focuses on J.A.'s demeanor, arguing that if she had previously been raped, she would not be smiling and laughing with Hetrick during the second incident. But considering her age and developmental stage, it seems reasonable to us that she would not have understood the significance of what had happened earlier. In any case, there is no evidence to suggest whether she did or did not understand the incident and thus Hetrick's argument is purely speculative, not based on the record.

No. 33618-9-II

P.2d 980 (1970); *State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980). The juvenile court could find that J.A. testified truthfully and that Hetrick raped her.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Hunt, J.

Van Deren, A.C.J.